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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ANDREA LAURIA,

Plaintiff,

vs.

UNITED STATES OF AMERICA and
CHRIS HEITSTUMAN,

Defendant.

Case No. 3:20-cv-00210-SLG

OPPOSITION TO MOTION TO DISMISS

COMES NOW Plaintiff Andrea Lauria, by and through her attorneys Cashion Gilmore LLC, and opposes the Motion to Dismiss for Lack of Jurisdiction. Dismissal is not appropriate because Plaintiff has filed an amended complaint with the consent of the United States that cures any deficiency identified in the Motion to Dismiss.

The government moves to dismiss the complaint because the named defendants are the United States Department of Homeland Security and Chris Heitstuman, and the appropriate defendant under a Federal Tort Claims Act case is the United States. The motion cites *Kennedy v. U.S. Postal Service*¹ in support of the argument that the complaint be dismissed. In *Kennedy* the plaintiff sued the United States Postal Service under the Federal Tort Claims Act.² The court concluded that the United States Postal Service is not a proper plaintiff under the Federal Tort Claims Act. Critically, the court also upheld the lower court's determination that allowing an amendment to substitute the United States for the United States Postal Service would be futile because federal postal service employees are preempted from bringing an action under the FTCA by statute.³

Here, a motion to amend the complaint with consent of the United States was filed and granted after the Motion to Dismiss was filed. There is not a statute that prevents a private person from bringing an action against the United States for the wrongful conduct of a Department of Homeland Security law enforcement officer. The amended complaint removes the United States Department of Homeland Security and

¹ 145 F.3d 1077 (9th Cir. 1998).

² *Id.* at 1078.

³ *Id.* (“Federal employees alleging employment-related tort claims subject to the CSRA may not bring an action under the FTCA.”). The Government also cites *Lance v. United States*, 70 F.3d 1093 (9th Cir. 1995) in support of its position that Ms. Lauria’s claims be dismissed. In *Lance* a volunteer worker at a Veteran’s Administration hospital was injured and received treatment for the injury at the hospital. He then sued for medical malpractice under the FTCA. The Court dismissed the claim concluding that it the Federal Employees Compensation Act provided the exclusive remedy for the injury and treatment of the injury.

names in its stead the United States. Pursuant to Civil Rule 21, the “[m]isjoinder of parties is not a ground for dismissing an action.” Because the non-opposed Motion to Amend has been granted, the Motion to Dismiss as to the United States is moot.

The Motion to Dismiss also addresses whether the complaint should be dismissed against Chris Heitstuman. To date Heitstuman has not been served with the complaint. If the United States certifies that Heitstuman was acting within his scope of employment when the wrongful conduct against Lauria occurred then Heitstuman would be appropriately dismissed from the action.⁴ Barring such certification Heitstuman is a proper plaintiff in this action.

For these reasons the Motion to Dismiss should be denied.

CASHION GILMORE LLC
Attorneys for Andrea Lauria

/s/ Mera Matthews

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CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the foregoing was served electronically on November 5, 2020 via the Court's CM/ECF system on the following:

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CASHION GILMORE LLC

By: s/ Mera Matthews

⁴ See 28 U.S.C. § 2679(d)(1)-(2).